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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1984

DUN & BRADSTREET, INC.,

*v.*

*Petitioner,*

GREENMOSS BUILDERS, INC.,

*Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME  
COURT OF THE STATE OF VERMONT

**BRIEF AMICUS CURIAE IN SUPPORT OF  
RESPONDENT GREENMOSS BUILDERS, INC.**

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**BRIEF AMICUS CURIAE IN SUPPORT OF  
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Sunward Corporation ("Sunward") respectfully submits this brief as an amicus curiae in support of Respondent Greenmoss Builders, Inc. The parties have given their written consent to the filing of this brief, and copies of the letters of consent have been filed with the Clerk.

**INTEREST OF THE AMICUS**

Sunward is a party to a case now pending before the Tenth Circuit Court of Appeals, *Sunward Corp. v. Dun & Bradstreet, Inc.*, appeal docketed, No. 83-2644 (10th Cir. Dec. 23, 1983), in which Sunward recovered approximately \$3.8 million against Dun & Bradstreet, Inc. ("D&B") for publication of libelous credit reports. In that case, Sunward relied upon the doctrine of presumed damages. (The interest of

Sunward is more fully set forth in its previous Motion for Leave to File Amicus Brief and the brief accompanying that motion.) The purpose of this brief is to elaborate on the arguments set forth in the previous brief in light of the questions posed by the Court for supplemental briefing.

### SUMMARY OF ARGUMENT

Presumed damages in business libel situations serve the legitimate state interest of compensating defamed plaintiffs. The Court should not interfere with this interest since, because of the characteristics both of credit report speech and of *Dun & Bradstreet* as speaker, presumed damages are not likely to chill protected speech.

Because credit reports share common traits with advertising, the Court should classify the reports as commercial speech. Moreover, the Court need not decide the exact level of protection mandated for credit reports by the commercial speech doctrine because the majority of states protect *Dun & Bradstreet* from liability, and accordingly from presumed damages, by extending a conditional privilege to credit reports. Thus, a plaintiff cannot recover presumed damages except in instances when *Dun & Bradstreet* has acted recklessly or maliciously. Although the culpability requirement differs from the reckless disregard standard defined in the Court's decisions in *New York Times* and *Gertz*, it adequately protects *Dun & Bradstreet* from self-censorship, and makes superfluous any further protection extended by the commercial speech doctrine.

### ARGUMENT

[W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include

vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.

*New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). With this principle in mind, the Court began its attempt to achieve the proper balance between the first amendment and the common law of defamation. The effort has not been easy. The Court has divided sharply at times, *see, e.g., Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), and overturned previous decisions, *see Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) ("overruling" *Rosenbloom*'s public interest test). Last term the Court reaffirmed the underlying principles of *New York Times* in upholding the requirement of *de novo* appellate review of a fact finder's determination of "actual malice." *Bose Corp. v. Consumers Union of United States, Inc.*, 104 S.Ct. 1949 (1984). In doing so, however, the Court was addressing speech regarding an issue quite different from the one in *New York Times*.<sup>1</sup> The irony that *Bose* should secure a place among the progeny of *New York Times* and *Gertz*, was not lost upon the Court.

[T]he analysis of the central legal question before us may seem out of place in a case involving a dispute about the sound quality of a loudspeaker.

104 S.Ct. at 1967. *See also id.* (Rehnquist, J., dissenting) (noting irony of extending *New York Times* to "false statements about a commercial loudspeaker system").

Now comes forth yet another party to claim its place as an heir to the *New York Times/Gertz* lineage. *Dun & Bradstreet* — a multimillion dollar purveyor of credit reports — argues that, without the protections against presumed and punitive damages set forth in *Gertz*, its voice will be chilled.

1. The District Court had determined that the principles of *New York Times* and *Gertz* were applicable in a product disparagement suit. 508 F. Supp. 1249, 1271 (D. Mass. 1981). Because that issue was not raised in the Court of Appeals, it was not addressed there. Similarly, this Court took as a given the applicability of *New York Times* and *Gertz*. 104 S.Ct. at 1966.

D&B characterizes its claim to *Gertz* protection as something akin to manifest destiny:

[T]he time has come to carry *Gertz* to its necessary conclusion. The only way to ensure justice is to apply the same constitutional limitations on damages to every defamation defendant.

Petitioner's Supplemental Brief at 23. The issue, however, is not nearly so simple. Dun & Bradstreet is requesting constitutional intervention into the states' law of defamation so that the "free flow" of speech can continue. The question is whether this intervention is really necessary. In other words, do presumed damages, in the context of libelous Dun & Bradstreet credit reports, actually threaten suffocation of protected speech. This brief will establish that presumed damages serve an important state interest in the context of business libel.<sup>2</sup> This interest should not be dismissed as cavalierly as D&B suggests. Further, because of the characteristics of the type of speech in which Dun & Bradstreet engages, extension of the actual malice standard is not necessary to ensure adequate "breathing space" for truthful credit report "speech." To reach this conclusion the Court need not, and arguably should not, resolve the media/nonmedia question.<sup>3</sup> Instead, the Court should classify credit reports as a species

2. Sunward takes no position on the punitive damages issue, which is not presented in its case before the Tenth Circuit, and which is conceptually distinct from the presumed damages issue, notwithstanding the efforts of Dun & Bradstreet and its supporting amici to treat them as one.

3. Dun & Bradstreet and its supporting amicus curiae are not broadly representative of the "nonmedia." In fact, as is implied in their arguments, they might more accurately be referred to as "quasi-media." See, e.g., Brief Amicus Curiae of Information Industry Association at 2-6. Because Dun & Bradstreet's "speech" presents its own unique constitutional questions, the Court's focus should be narrow, and not be broadened to nonmedia speakers who present both a more sympathetic case (e.g., a speaker addressing an audience on a matter of public concern), and less sympathetic case (e.g., a purely private defamation situation, such as when the mother of the groom informs the mother of the bride that the bride is unchaste), for extension of *Gertz*.

of commercial speech, which are adequately protected by the common law in most states. At most, an admonition that the states cannot impose liability without fault would protect D&B's speech.

# I. THE STATES HAVE A LEGITIMATE INTEREST IN PRESERVING THE DOCTRINE OF PRESUMED DAMAGES.

Throughout the briefs of Dun & Bradstreet and its army of amici, it is argued that the *Gertz* analysis of presumed damages is perfectly applicable to cases involving defamatory credit reports in particular, and business libel in general. Additionally, D&B and its supporters equate presumed damages with "windfalls" and assert that these types of damages have no relation to "actual injury." As demonstrated in Sunward's initial amicus brief, Brief of Sunward Corp. at 5-8, Dun & Bradstreet fails to give adequate weight and consideration to the states' interest in allowing presumed damages in the specific area of business libel. Since D&B insists that *Gertz* controls this issue, it is appropriate to examine the distinctions between presumed damages as applied in a business libel case, and as applied in *Gertz*.

In *Gertz*, the Court was faced with the personal defamation of an individual. Under the circumstances of that case, and similar cases involving individual plaintiffs, the doctrine of presumed damages can indeed be "an oddity." 418 U.S. at 349.

No proof of actual damages was offered. Under the Court's instructions, the jury was permitted to presume injury as a matter of law. . . . [I]t assessed plaintiff's damages at \$50,000.

*Gertz v. Robert Welch, Inc.*, 471 F.2d 801, 804 (7th Cir. 1972), *rev'd*, 418 U.S. 323 (1974). Thus, in *Gertz* the determination of damages may indeed have been left to the "uncontrolled discretion" of the jury. 418 U.S. at 349. In a business libel situation, however, and particularly given the jury instructions in both *Greenmoss* and *Sunward*, the jury is provided

more tangible guidance. The jury is not free to award whatever amount it feels is appropriate.

A plaintiff in a business libel situation will introduce evidence of damages of a more tangible nature than will a plaintiff in a case of individual defamation. This evidence will usually take the form of lost profits. Dun & Bradstreet acknowledges this in its brief by noting that a typical business plaintiff will attempt to quantify its damages through projections of sales and profits and comparisons with actual results. Petitioner's Supplemental Brief at 12. Dun & Bradstreet argues, however, that these sales and profit figures are "grossly inflated." To the extent this is true, the abolition of presumed damages is not the answer. Rather, Dun & Bradstreet is free to present evidence questioning the appropriateness of the plaintiff's figures. Indeed, at trial in *Sunward* Dun & Bradstreet did exactly that. Moreover, to the extent the plaintiff's figures are purely speculative, the trial court can exclude the evidence, or instruct the jury not to base any award on speculations. Thus, although both the *Greenmoss* and *Sunward* juries were instructed that damages were presumed, both juries were also told that they could return a verdict of \$1. In other words, the juries did not have to give effect to the presumption. Both juries also were informed that their damage calculations could not be based on speculation. See also *Maheu v. Hughes Tool Co.*, 569 F.2d 459, 474-77 (9th Cir. 1977) (damage award overturned where damage theory based purely on speculation).

Rather than being merely a windfall, the function of presumed damages in a business libel situation is to assist a plaintiff faced with an otherwise insurmountable causation problem. Presumed damages do not leave a jury with unbridled discretion. Instead, the doctrine allows a jury to look at proof of a tangible loss, *i.e.*, lost profits, and decide whether to attribute that loss to the defamatory credit reports. This has apparently always been a function of and rationale for the doctrine. See W. Prosser, *HANDBOOK OF THE LAW OF TORTS* § 112, at 765 (4th ed. 1971) ("[I]t is clear that proof of actual

damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact.").

When a respected organization such as Dun & Bradstreet disseminates a libelous credit report, it is providing this information to subscribers who have expressed an interest about the financial situation of the company that is the subject of the report. It is counter-intuitive to think that such a report can be harmless. In this regard, Dun & Bradstreet's argument contains an inherent contradiction. On the one hand, Dun & Bradstreet seeks first amendment protection because of the importance of its reports both to subscribers and to those about whom the reports are issued. Yet, on the other hand, Dun & Bradstreet implies that a libelous credit report may cause little or no damage. Petitioner's Supplemental Brief at 12.

The factual situation in the *Sunward* case vividly illustrates the dilemma faced by a plaintiff. False and defamatory credit reports were issued for a period of at least three years without the knowledge of Sunward. During this time, sales of the plaintiff declined precipitously, in marked contrast to sales of its competitors, with which Sunward had historically kept pace or bettered. Rumors arose in the industry that the plaintiff was in dire financial straits. To an extent, the rumors became self-fulfilling prophecies. Eventually, Sunward discovered that hundreds of the libelous Dun & Bradstreet reports had been issued. Prominently included among the subscribers were numerous competitors of the plaintiff. Sunward was unable, however, to trace the libelous credit reports to specific lost sales or denials of credit. Under these circumstances, Sunward based its damage theory on a comparison of Sunward's sales in relation to the steel building industry prior to the reports, and its sales in comparison with the industry during the time of the distribution of the libelous information. Dun & Bradstreet was not saddled with acceptance of this damage figure. The trial of the case involved an intense

dispute regarding whether Sunward's precipitous decline in sales was actually the result of an overall decline in the agricultural market, which Dun & Bradstreet argued was a major outlet for Sunward's product. The jury resolved this evidentiary dispute and awarded Sunward approximately \$3.8 million. This amount was significantly less than Sunward's overall decline in profits and its losses during the years in question.

In a business libel context, presumed damages serve what amounts to a burden shifting purpose. To the extent that uncertainty exists regarding whether a defamatory credit report actually caused lost profits, Dun & Bradstreet, the wrongdoer, should bear the burden of that uncertainty. This is particularly appropriate since Dun & Bradstreet, with its confidentiality requirements, contributes to the causation problem. The standard Dun & Bradstreet contract restricts subscribers in attributing information to Dun & Bradstreet, making it difficult or impossible to trace negative information back to a libelous report.<sup>4</sup>

Dun & Bradstreet has argued that, by definition, this is not the case where a plaintiff has discovered the existence of a defamatory report and brought suit against Dun & Bradstreet. Once suit is brought, the plaintiff can obtain subscriber lists through discovery and attempt to elicit information from those subscribers regarding the effect of the defamatory credit reports. Dun & Bradstreet's argument,

4. The standard Dun & Bradstreet contract contains restrictions stating as follows:

All information furnished hereunder shall be held in strict confidence and shall never be reproduced, revealed or made accessible in whole or in part, in any manner whatsoever to any others unless required by law.

....

Neither Dun & Bradstreet, Inc. nor the Reference Books and/or Directories will be identified by the subscriber as a source reference ....

See Appendix to Sunward's Initial Amicus Brief, ¶¶ 2 & 5, at A-2.

however, overlooks two critical points. First, the subscribers may often be competitors or creditors of the plaintiff, and thus reticent about revealing either their use of the credit report, or its impact upon their actions toward the plaintiff.<sup>5</sup>

Second, the defamatory impact of a libelous credit report may be many times removed from the initial subscriber. In other words, the gist of the defamatory information in a libelous report may be passed from entity to entity, without attribution to Dun & Bradstreet because of its confidentiality agreements. A plaintiff such as Sunward may face rumors in the industry of its demise, and yet find it impossible to trace these rumors back to Dun & Bradstreet.

Eliminating the doctrine of presumed damages would, in many instances, deny any compensation to companies defamed by a libelous credit report, regardless of the harm done thereby. Moreover, because of this Court's expansive definition of "actual injury" in *Gertz*, the elimination of presumed damages would have a disparate impact on defamed companies. In *Gertz*, the Court included in its definition of actual injury such matters as mental distress, humiliation, and embarrassment. 418 U.S. at 350. Obviously, a defamed company cannot recover for having its feelings hurt. A damaged business reputation results in harm to the pocketbook, not the psyche. Under Dun & Bradstreet's argument, a defamed company, which may have suffered tangible pecuniary loss, is denied recovery, while a defamed individual, who also is theoretically denied the benefit of presumed damages, can overcome his causation hurdle simply by testifying

5. For example, Greenmoss' bank received the libelous Dun & Bradstreet report, and shortly thereafter denied credit to Greenmoss and suggested Greenmoss take its banking elsewhere. Yet at trial, a representative of the bank insisted that the false credit report had no effect on the bank's decision.

regarding his embarrassment, humiliation, and mental distress brought on by the defamatory publication.<sup>6</sup> The discretion of a jury in arriving at an amount to compensate such intangible harm is much more unbridled than in the typical business libel situation. A ruling that would allow an individual such as Mr. Gertz to recover for his hurt feelings,<sup>7</sup> yet deny any relief to Sunward or Greenmoss, would be a greater anomaly than the doctrine of presumed damages.

In summary, the state law of presumed damages in the business libel context serves the significant state interest of assisting a defamed plaintiff in overcoming causation problems in a situation where it is likely that significant damages have occurred. Moreover, juries in these cases are presented with more tangible evidence of the quantity of those damages than in situations involving defamed individuals. Plaintiffs are not free to introduce totally speculative theories about possible lost profits. Dun & Bradstreet is free to introduce evidence attributing to other causes any decline in profits or failure to achieve expected growth. Therefore, the Court clearly is not facing the "oddity of tort law" that was the basis for its ruling in *Gertz*.

6. The events in *Gertz* subsequent to this Court's remand of that case are enlightening. At his second trial, Mr. Gertz testified to "severe mental distress, anxiety, and embarrassment," which he suffered as a result of the defamatory article. The jury awarded him \$100,000 in compensatory damages for this injury. 680 F.2d 527, 540 (7th Cir. 1982), *cert. denied*, 459 U.S. 1226 (1983). See also *Time, Inc. v. Firestone*, 424 U.S. 448 (1976) (although no evidence of harm to reputation, evidence supported injury in form of mental distress; no basis for overturning jury verdict awarding \$100,000).

7. In making this argument, Sunward is not denigrating the value of an individual's reputation. It is simply arguing that the monetary value to be attached to an individual's reputation is harder to quantify than that of a business. Thus, a jury has greater discretion in the former situation than in the latter.

## II. THE TYPE OF "SPEECH" IN WHICH DUN & BRADSTREET ENGAGES IS UNLIKELY TO BE CHILLED BY PRESUMED DAMAGES.

The previous section demonstrates that the states have a legitimate interest in the doctrine of presumed damages in the context of a business libel. One may disagree about whether the doctrine is the most appropriate manner of serving that interest. However, it is not this Court's role to require modification of the common law simply because it is imperfect or unwise.<sup>8</sup> The Court need only ensure that the common law does not transgress the protections set forth in the Constitution. Since false and defamatory speech is not protected for its own sake by the first amendment, modification of state law is only justified if it negatively affects protected (*i.e.*, truthful) speech. Dun & Bradstreet has baldly asserted that presumed damages have such an impact on its credit reports. In other words, Dun & Bradstreet claims that the Court's concern in *Gertz* with "breathing space" for protected speech is directly applicable to credit reports. Dun & Bradstreet has brought forth no empirical evidence in support of this proposition, and in fact, Dun & Bradstreet's "breathing space/chilling effect" argument is deficient in a number of respects.

8. Dun & Bradstreet and Amicus Curiae Dow Jones & Co. argue that, even if presumed damages for libelous credit reports are equated with state regulation of commercial speech, Dun & Bradstreet should prevail because the doctrine is not "narrowly drawn" to achieve a "substantial state interest." In essence, they challenge the wisdom of using presumed damages to achieve the goal of compensating defamed parties. Their analysis, however, only becomes applicable if the states' "regulation" affects protected speech. False commercial speech is not protected from regulation. Therefore, the Court need not decide whether the doctrine of presumed damages is the best way to achieve the states' interest in compensating defamed parties.

**A. Credit Reports Have Sufficient "Breathing Space" Because of Characteristics of the Speech and Speaker.**

As the Fifth Circuit noted in *Hood v. Dun & Bradstreet, Inc.*, 486 F.2d 25, 32 (5th Cir. 1973), *cert. denied*, 415 U.S. 985 (1974), empirical evidence suggests that Dun & Bradstreet, and other credit reporting agencies, exist and thrive in states refusing to extend even a conditional, common law privilege to credit reports. This fact strongly suggests that credit report "speech" is hardy. An examination of the type of speaker Dun & Bradstreet is, and of the type of speech in which it engages, demonstrates the reason for this hardiness.

D&B is an atypical first amendment speaker engaged in atypical first amendment speech. Lower courts have consistently rejected first amendment protection for credit reports. See, e.g., *Millstone v. O'Hanlon Reports, Inc.*, 528 F.2d 829 (8th Cir. 1976) (opinion by Justice Clark); *Hood v. Dun & Bradstreet, Inc.*, 486 F.2d 25 (5th Cir. 1973), *cert. denied*, 415 U.S. 985 (1974); *Grove v. Dun & Bradstreet, Inc.*, 438 F.2d 433 (3d Cir.), *cert. denied*, 404 U.S. 898 (1971). The name of the trade association to which Dun & Bradstreet belongs—Information Industry Association—speaks volumes about Dun & Bradstreet, as does the general description of these entities' operations:

IIA members are united by their interest in delivering information content to the public. Information industry companies create, distribute, and manage a wide range of information content, including news, governmental, economic and academic studies, financial and business data, and virtually any other material for which there is sufficient demand. They do so by gathering information, by identifying the relevant and significant data, by organizing them for ready access and use, and by marketing their product to people for whom it has value and significance. This information chain is labor intensive, costly, and depends for its success on a constant

*striving for accuracy because the specific markets served are highly sensitive to error.*

Brief Amicus Curiae of Information Industry Association at 2-3 (emphasis added). This description does not bring to mind first amendment values, such as robust debate on matters of public concern, or a speaker's interest in self-expression. Instead, this industry is apparently made up of information gatherers and assimilators. The lack of traditional first amendment concerns is even more apparent in Dun & Bradstreet's stock-in-trade — the credit report. These reports are fact-oriented. They contain no opinion or editorialization. In fact, one of Dun & Bradstreet's most prominent traits is that it is a speaker without a viewpoint. It cares not whether the content of its speech is pro or con regarding the subject. It cares only that the reports are accurate. The rationale of *Gertz* is completely inappropriate here.<sup>9</sup>

The more closely one scrutinizes Dun & Bradstreet, the more tenuous its "breathing space" argument becomes. Dun & Bradstreet claims that its subscribers and the subjects of credit reports have an interest in timely and accurate information. Note, however, the dual nature of this interest. Accuracy is critical. Although Dun & Bradstreet argues that without *Gertz* protection, information must be "laboriously triple-checked," Petitioner's Supplemental Brief at 22, this overlooks Dun & Bradstreet's own procedures for ensuring the accuracy of information. A reasonable amount of checking is to everyone's benefit since false information, even if timely, has no utility. In the context of an issue of public concern, a false statement might provoke further debate. *New York Times*, 376 U.S. at 279 n.19. Dun & Bradstreet,

9. In considering the question of whether *Gertz* should be extended to credit reports, one noted commentator has stated, "[i]f the first amendment requirements outlined in *Gertz* apply, there is something clearly wrong with the first amendment or with *Gertz*." Shreffin, *The First Amendment and Economic Regulation: Away From A General Theory of the First Amendment*, 78 Nw. L. Rev. 1212, 1268 (1984).

however, does not operate in the marketplace of ideas. It simply operates in the marketplace.

**B. D&B Credit Reports Differ Significantly From "Media" Speech on Similar Topics.**

Dun & Bradstreet has argued that, in some respects, it is no different than many media defendants and that no principled basis exists for denying it the protection of *Gertz*. D&B insists that much of the information contained in its credit reports could, and does, appear in the "media." Therefore, it reasons, no basis exists for applying differing standards to Dun & Bradstreet.<sup>10</sup>

Crucial distinctions, however, exist between Dun & Bradstreet and more traditional media that might justify extending *Gertz* to the latter, but not to the former. First, the bankruptcy listings or criminal proceedings reported in *The Burlington Free Press* are more subject to a chilling effect than are Dun & Bradstreet's reports. The newspaper can simply decide not to publish risky information. Since its profits stem from other factors, it has no incentive, other than a sense of journalistic professionalism and pride, to publish. See Anderson, *Libel and Press Self-Censorship*, 53 Texas L. Rev. 422, 432 n.52 (1975). Dun & Bradstreet, on the other hand, has a tremendous pecuniary interest in providing information to its subscribers. They purchase Dun & Bradstreet credit reports to secure this type of information, as well as "special notices" such as the bankruptcy report in *Greenmoss*. This supply and demand aspect of credit information can be analyzed in terms of resource allocation and risk spreading.

10. As an initial matter, this argument assumes the question. This Court has not held one way or the other whether basic, factual commercial information published in the press would receive *Gertz* protection. In a different context, the Court has held that commercial speech in a newspaper could be regulated without violating the first amendment. *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973).

[P]rofit would dictate that information suppliers should invest in resources leading to accurate fact-finding only to the point needed to assure maximum profits. Beyond that point, investment in accuracy would be wasteful. Allowing a defamation action in some markets might lead some suppliers to invest more in assuring accurate information and, in any event, would spread the risk of inaccuracy, and compensate for damages resulting from loss of reputation.

Shriffin, *supra* note 9, at 1250 n.247.<sup>11</sup>

Another critical distinction between Dun & Bradstreet and the media involves the audience for credit reports. Dun & Bradstreet targets a limited, private audience. Moreover, through its confidentiality agreements, Dun & Bradstreet operates within a closed system. Thus, a defamed party does not have easy access to the information, which is being distributed to parties expressing, or having previously expressed, a specific interest in the subject of the report. These factors not only increase the risk of harm, they demonstrate a "commonsense" distinction between Dun & Bradstreet and other first amendment speakers.<sup>12</sup> Dun & Bradstreet simply is not interested in the general free flow of information.

11. This economic analysis can be extended to the doctrine of presumed damages. As established earlier, a libelous credit report may cause substantial damages, and yet it may be impossible to causally link the report with the damages. From an allocative efficiency standpoint, these damages represent a hidden cost of the credit reporting business. Presumed damages not only allow a plaintiff to overcome causation problems, but also spread these costs among those who created the costs and are most capable of absorbing them, *i.e.*, Dun & Bradstreet and its subscribers.

12. Amicus Dow Jones & Co. recognizes that the states should be allowed "to make legal distinctions based on the different characteristics of the various media." Brief Amicus Curiae of Dow Jones & Co. at 8-9 n.2. Sunward submits that defamation is one such area in which distinctions should be allowed.

### III. CREDIT REPORTS SHOULD BE CLASSIFIED AS COMMERCIAL SPEECH.

Dun & Bradstreet and the amici have responded to the Court's inquiry about "speech of an economic or commercial nature" by missing the point. First, they argue that such a distinction would be content-based, thereby violating the principles of *Gertz*. Second, they argue that the Court has often ruled that the first amendment extends to expression about numerous matters, including economics and commerce. Third, they claim that the commercial speech doctrine is limited to advertising, and therefore is inapplicable to credit reports. Sunward disputes all these assertions.

#### A. Denying or Limiting First Amendment Protection to Credit Reports Does Not Violate Any Principle Relating to Content-Based Distinctions.

The evils behind content-based distinctions are the necessity of ad hoc determinations by the judiciary regarding whether speech is protected, and the possibility of censorship or punishment of unpopular speech. These are the reasons the *Gertz* court eschewed *Rosenbloom*'s public interest test.<sup>13</sup> When the rationale underlying content-neutrality is examined, it becomes clear that refusing to extend *Gertz* to credit reports would not violate that principle. Credit reports are easily categorized. No ad hoc determinations are required. Moreover, since D&B itself does not have a viewpoint regarding its speech, certainly no fear of government bias exists

13. Despite *Gertz*' rejection of *Rosenbloom*, content remains important in first amendment law in general, and in defamation law in particular. The public figure and public official tests are basically attempts to protect speech of a certain content, but without the necessity of making judgments regarding that content. Note, *Mediaocracy and Mistrust: Extending New York Times Defamation Protection to Nonmedia Defendants*, 95 Harv. L. Rev. 1876, 1882-86 (1982). Of course, content-based distinctions are made in other areas of speech. In fact, the Court has even indicated that "[i]f commercial speech is to be distinguished, it 'must be distinguished by its content'." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 504 n.11 (1981) (quoting *Virginia State Board*, 425 U.S. at 761).

regarding the content of that speech. The evils of content-neutrality are simply not present.

#### B. A Workable Distinction Can Be Drawn Between Speech About Economics and Commerce, and "Speech of an Economic or Commercial Nature."

In addressing the second question posed by the Court for supplemental briefing — whether *New York Times* and *Gertz* should be applied to speech of an economic or commercial nature — D&B and the amici have rephrased the question to ask whether *Gertz* should protect speech about matters of economics or commerce. Credit report "speech" is not about economics or commerce. Credit reports contain basically factual material concerning a certain business, e.g., gross sales, number of employees, location, amount of inventory, type of business, payment of debts, bankruptcy filings, and other financial information. Their main characteristic, however, is that they are primarily factual, not analytical. In this sense, Dun & Bradstreet is much like the pharmacist in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976).

Our pharmacist does not wish to editorialize on any subject, cultural, philosophical, or political. He does not wish to report any particularly newsworthy fact, or to make generalized observations even about commercial matters.

Similarly, Dun & Bradstreet credit reports do not speak "about" economics and commerce. They express straightforward facts regarding individual businesses.<sup>14</sup>

14. Of course, the Court in *Virginia State Board* went on to recognize that the "commercial speech" in which the pharmacist did desire to engage was entitled to some constitutional protection. Similarly, credit reports may be entitled to some constitutional protection. As will be established below, however, because of the high level of common law protection afforded to credit reports in most states, constitutional protection would be superfluous.

### C. Credit Reports Share Basic Characteristics of Commercial Speech.

Dun & Bradstreet reasons that this Court's commercial speech cases have been limited to states' attempts to regulate advertising. It also notes that the Court has justified lesser protection for commercial speech because it is easily verifiable and is hardy. *See, e.g., Virginia State Board*, 425 U.S. at 772 n.24. Dun & Bradstreet argues that its speech lacks these characteristics, and therefore should not be classified as commercial speech. D&B's niggardly definition of "commercial speech" presents numerous problems. More importantly, regardless of whether D&B's analysis of the Court's commercial speech precedents is correct, credit reports share traits with advertising that make application of *New York Times/Gertz* inappropriate.

Although most of the cases were decided prior to the Court's development of the commercial speech doctrine, lower courts have consistently classified Dun & Bradstreet credit reports as unprotected by the first amendment. *See, e.g., Hood v. Dun & Bradstreet, Inc.*, 486 F.2d 25 (5th Cir. 1973), *cert. denied*, 415 U.S. 985 (1974); *Grove v. Dun & Bradstreet, Inc.*, 438 F.2d 433 (3d Cir.), *cert. denied*, 404 U.S. 898 (1971). In doing so, these courts noted the unique characteristics of credit reports, then labelled them commercial speech. This approach not only has intuitive appeal, it can be reconciled with the Court's later decisions on commercial speech.

Although most of the Court's commercial speech cases have dealt with some form of advertising, the Court's definition of commercial speech is capable of a broader application. *See Comment, The New Commercial Speech and the Fair Credit Reporting Act*, 130 U.Pa.L.Rev. 131, 133-145 (1981) (analyzing cases and concluding that credit reports should be entitled to some constitutional protection under commercial speech doctrine). Even if inclusion of credit reports within the definition of commercial speech is an extension of the doctrine, it is a principled and controllable one. A credit

report is a credit report. Because they are easily identifiable, and share the two characteristics of advertising — verifiability and hardiness — credit reports should be classified as commercial speech. Moreover, strong policy concerns support rejection of Dun & Bradstreet's narrow approach to commercial speech.

#### 1. Because of Their Factual Nature, Credit Reports Are Easily Verifiable.

Dun & Bradstreet takes a narrow view of the verifiability question. It relies on the following language in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 564 n.6 (1980): "[C]ommercial speakers have extensive knowledge of both the market and their products.

Thus, they are well situated to evaluate the accuracy of their messages . . . ." D&B then argues that it is not speaking about its own product, and therefore the verifiability rationale does not apply. This argument ignores the factual nature of Dun & Bradstreet's speech, and the critical need for accuracy in it. Because of these two factors, credit report speech is not only verifiable, but to have utility, subscribers must believe the information has indeed been verified. Dun & Bradstreet has an elaborate system for accomplishing this task. When it follows the requirements of its own system, it is extremely unlikely that Dun & Bradstreet could ever be found liable for defamation. (See the discussion of Dun & Bradstreet's common law privilege, Section IV, *infra*.) Thus, although verification is achieved through different means, its importance to subscribers dictates that D&B check information, and indicates a similarity between credit reports and advertising.

#### 2. Credit Report Speech is Hardy.

The key trait shared by advertising and credit reports is hardiness. As discussed earlier, the hardiness issue is critical because it relates directly to the primary rationale of *New York Times/Gertz* — chilling of protected speech. Credit reports are undoubtedly hardy.

In *Central Hudson*, the Court noted that "commercial speech, the offspring of economic self-interest, is a hardy breed of expression that is not 'particularly susceptible to being crushed by overbroad regulation.'" 447 U.S. at 564 n. 6. "Economic self-interest" is the reason credit reports exist. Dun & Bradstreet attempts to deal with this fact by arguing that it should not forfeit first amendment protection simply because it sells information for a profit. But the "economic self-interest" in credit reports is not simply that of Dun & Bradstreet. The reports are critical to the economic self-interest of Dun & Bradstreet's subscribers and to the subjects of the reports.<sup>15</sup> This demand for credit information ensures the hardness of Dun & Bradstreet's speech.

### 3. Accepting D&B's Narrow Definition of Commercial Speech Would Cause Significant Problems in Other Areas of State Regulation.

If commercial speech is limited to advertising, and no distinctions can be drawn among speakers and types of speech in defamation cases, the genie will be loosed from its bottle. State and lower federal courts have used the commercial speech doctrine to justify government regulation of what would otherwise appear to be protected first amendment speech. See, e.g., *SEC v. Lowe*, 725 F.2d 892 (2d Cir. 1984), petition for cert. filed, 53 U.S.L.W. 3020 (U.S. May 16, 1984) (No. 83-1911) (using commercial speech doctrine as basis for upholding SEC's restriction on investment advisor's newsletter); *Minnesota ex rel. Spannaus v. Century Camera, Inc.*, 309 N.W. 2d 735 (Minn. 1981) (state statutes limiting employer in requiring and disclosing polygraphs is constitutionally valid restriction on commercial speech). This Court has noted that "the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity." *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 456 (1978). Yet acceptance of

15. In fact, Dun & Bradstreet uses the latter factor to help it gather information. It stresses to the subjects of reports that it is in their economic self-interest to provide information to Dun & Bradstreet.

D&B's arguments would call into question numerous regulations, including legislation in the closely related area of consumer credit reports. See Fair Credit Reporting Act, 15 U.S.C. §§1681 to 1681t (1976).

The Brief Amicus Curiae of the Information Industry Association suggests even more difficult problems. As the "information industry" achieves high-tech capability, individuals and small companies will face Orwellian-type situations regarding their privacy and reputations. The amici are asking for full constitutional protection for their "industry" before all the implications and complications are known. In the last communications revolution — television — this Court wisely rejected automatic application of traditional first amendment doctrines. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386 (1969) ("[D]ifferences in the characteristics of news media justify differences in the First Amendment standards applied to them.").

Finally, the Court should note that the recurring theme in the briefs of D&B and its supporting amici is the difficulty of making distinctions, whether it be toward speaker or speech. Surely, however, a comparison between the concerns that spawned *New York Times*, and the societal value of commercial credit reports reveals that critical differences exist. This Court should heed its own warning:

To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech.

*Ohralik*, 436 U.S. at 456. *Gertz* itself would be an example of the principle. While generally thought of by the press and commentators as a setback on the right to report on matters of public concern, *Gertz* would simultaneously elevate credit report speech and credit reporting agencies to the same level as political debate and the *New York Times*. Reference is made once more to Professor Shrifin — if *Gertz* applies to credit reports, "there is something clearly wrong with the first amendment or with *Gertz*." Shrifin, *supra* note 9, at 1268.

#### IV. THE COURT SHOULD NOT INTERFERE WITH STATE LAW REGARDING CREDIT REPORTS; THE COMMON LAW CONDITIONAL PRIVILEGE PROVIDES ADEQUATE PROTECTION.

The common law provides adequate protections for Dun & Bradstreet. A common law privilege, discussed at Sunward's previous Amicus Brief at 9-12, protects Dun & Bradstreet against not only presumed damages, but basic liability as well.<sup>16</sup> The existence of the common law privilege demonstrates that states faced with the problem have considered and balanced the reputational interests of their citizens against the need for a "free flow" of credit information. The balance achieved by these states generally requires a substantial showing of culpability by the plaintiff on the part of the credit agency. Dun & Bradstreet has not shown why this Court should upset these state determinations.<sup>17</sup>

16. In fact, because of the common law privilege, extension of the principles of *Gertz* to Dun & Bradstreet would result in greater protection in some states for defamatory credit reports than is given other types of defamatory speech. Compare *Gobin v. Globe Publishing Co.*, 216 Kan. 223, 531 P.2d 76 (1975) (private plaintiff can recover compensatory damages from media defendant upon showing of negligence), with *Kansas Electric Supply Co. v. Dun & Bradstreet, Inc.*, 448 F.2d 647 (10th Cir. 1971), cert. denied, 405 U.S. 1026 (1972) (applying Kansas law) (showing of wanton and reckless conduct necessary to establish liability of credit reporting agency).

17. Dun & Bradstreet may respond that the Vermont Supreme Court failed to extend a conditional privilege to credit reports. Given Dun & Bradstreet's failure to show any real risk of chill, and its performance in other states without a privilege, the Vermont decision may be appropriate. However, even if this Court disagrees with the Vermont decision, reversal is not mandated. The trial court required Greenmoss to prove a substantial degree of culpability on the part of Dun & Bradstreet. This Court need not decide the exact level of fault necessary to recover for a defamatory credit report, but only whether the showing made by Greenmoss was sufficient under the Constitution. If the Court disagrees with the Vermont Supreme Court's refusal to extend any privilege, an admonition, such as that in *Gertz*, that the states can set their own standards short of strict liability, would suffice.

A more practical problem involves a jury's ability to differentiate between the common law privilege and the constitutional requirement of "actual malice." A finding of culpability, usually defined in terms of malice, recklessness, or gross negligence, establishes basic liability under the common law in a case involving a defamatory credit report. Under *Gertz* a separate finding of actual malice, defined in terms of serious doubts about the truthfulness of the report, would be needed before presumed or punitive damages could be awarded. Before this Court embarks on a course that would add to the confusion of defamation law, it should consider whether the culpability differences existing between a showing of actual malice, and the showing necessary under the common law privilege, actually would increase Dun & Bradstreet's "breathing space."

When closely scrutinized, Dun & Bradstreet is suggesting that its reporters and information disseminators would feel less chill than they allegedly now do if they were aware that presumed damages would not attach except when they had subjective doubts about the truth. In other words, Dun & Bradstreet's employees find it difficult to breathe the truth under the threat of being held liable for gross negligence, but would feel secure under the subjective doubts test. Such an argument flies in the face of Dun & Bradstreet's training program, which emphasizes the interest in accuracy of both subscribers and those about whom the reports are issued. Indeed, one wonders how much faith a subscriber would place in a Dun & Bradstreet report if it were aware of Dun & Bradstreet's alleged need for greater breathing space in relation to the truth. More importantly, however, given the type of speech in which D&B engages, the increased protection provided by "actual malice" over D&B's common law privilege, would have a negligible impact, if any, on breathing space for protected speech.

**CONCLUSION**

Based upon the foregoing, Amicus Curiae Sunward Corporation respectfully requests the Court to affirm the judgment of the Vermont Supreme Court.

Dated this 23rd day of August, 1984.

Respectfully submitted,

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